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U.S. Department
of Transportation

**Federal Aviation
Administration**

Memorandum

Subject: Docket # FAA-2000-7554 - 3

Date: September 20, 2000

From: Mark G. Lawyer ARM-107
Transportation Industry Analyst
Office of Rulemaking

Reply to Mark Lawyer
Attn. of: 202-493-4531

To: Cynthia Hatten
Docket Management System, TASC

Please post the following to docket FAA-2000-7554 in the Docket Management System:

1. Memo for the Record, pertaining to a meeting held July 27, 2000
2. Summary of Meeting for the Record, pertaining to a meeting held August 9, 2000.

Thank you,

A handwritten signature in black ink, appearing to read 'M. Lawyer', followed by a horizontal line.

Mark Lawyer, ARM-107
Transportation Industry Analyst
Office of Rulemaking

MEMO FOR THE RECORD

On July 27, 2000, the Administrator, the Chief of Staff and the Deputy Associate Administrator for Regulation and Certification met with John O'Brien, representing the Air Line Pilots Association (ALPA), Ed Soliday representing United Airlines (UAL) and the Air Transport Association (ATA), and John Safety, representing the Allied Pilots Association (APA).

It is the position of ALPA, ATA and its member airlines, and APA that the Notice of Proposed Rulemaking (NPRM) entitled Flight Operational Quality Assurance Program (FOQA) does not properly reflect the Congressional direction contained in FAA's reauthorization legislation titled AIR 21. The organizations recommend that the NPRM be withdrawn and that a proposal that more closely aligns with the congressional direction be issued for comment.

All of the organizations strongly endorse FOQA programs as a tool to enhance aviation safety. Many airlines and their unions have entered agreements to establish FOQA programs and significant safety enhancements have already been realized. A key to expanding the current programs and to sharing the data with the FAA is the provision of protection from enforcement action for crewmembers and operators involved in these programs. Toward that end, the organizations worked with Congress to provide direction to FAA to issue a rule to protect air carriers and their employees from enforcement actions for violations of federal regulations, unless the violation is the result of criminal or other deliberate acts.

In the opinion of the organizations, the NPRM does not provide the level of protection that Congress directed. Because of this, it is the concern of all the organizations that the NPRM may undermine those programs that have already been established and may deter the formation of new programs.

Specifically, the organizations are concerned that the NPRM requires that data be maintained that can identify the aircraft and crew involved in a particular operation and that this data can be used by the FAA for enforcement and rulemaking. As currently constructed FOQA programs result in the immediate "deidentification" of the data. In addition, the NPRM allows for remedial enforcement action in the event it is determined that an operator or aircraft lacks qualification to hold a certificate issued by the FAA. This is broader enforcement authority than envisioned by Congress.

Summary of Meeting for the Record

On August 9, 2000, Federal Aviation Administration (FAA) representatives met with industry representatives at the offices of the Air Transport Association (ATA) in Washington, D.C. The following persons attended the meeting:

<u>Name</u>	<u>Organization</u>
Carl Burleson	FAA
Nick Lacey	FAA
Greg Michael	FAA
Tom Longridge	FAA
Mark Lawyer	FAA
Ed Soliday	United Airlines
J.L. Cole	Air Transport Association
Jim McKie	Air Transport Association
David A. Berg	Air Transport Association
Scott Foose	Regional Airline Association
Mark Clayton	Southwest Airlines
Tim Logan	Northwest Airlines
Harlan Cobert	Continental Express
Dale Pepper	Delta Airlines
Al Baldwin	Continental Airlines
John Buchan	Independent Association of Continental Pilots
Gene Couvillion	United Airlines/Air Line Pilots Association
Carl Halford	Trans World Airlines
Pat Sakole	America West Airlines
K.S. Griffith	American Airlines
D.W. Pitts	Allied Pilots Association
John G. Safley	Allied Pilots Association
A. H. Prest	Air Transport Association
Paul McCarthy	Air Line Pilots Association
John O'Brien	Air Line Pilots Association
Don McClure	Air Line Pilots Association

An FAA representative presented a general overview of the Flight Operational Quality Assurance Program (FOQA) Notice of Proposed Rulemaking (NPRM) that was published in the Federal Register on July 5, 2000.

The FAA representative clarified that the FAA does not intend the rule to make any changes to the existing status of mandatory Digital Flight Data Recorders (DFDRs). The FAA representative further clarified that the FAA intends to obtain statistical data that would enable it to accomplish quantitative trend analysis without requiring underlying data. There is no intent to identify flight crews or obtain individual flight data. The FAA believes that the NPRM is consistent with the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR-21) as it develops procedures to protect air carriers and their employees from punitive enforcement actions for violations. The FAA will not

use an operator's FOQA data or aggregate FOQA data in a punitive enforcement action against that operator or its employees when the FOQA data or aggregate data is obtained from a FOQA program that has been approved by the Administrator.

The FAA representative acknowledged that the FAA intends to retain discretion for remedial enforcement. However, the FAA acknowledges that inappropriate application of its discretionary authority would be detrimental to continued voluntary participation in FOQA programs. The FAA intends to reserve its remedial enforcement discretion for exceptional cases where an operator has shown blatant disregard of the need to take corrective action for violations that indicate serious adverse safety trends. The FAA believes that it was not the intent of Congress nor is it in the public interest to allow such trends to continue uncorrected.

Representatives of ATA and ALPA reiterated the position that was presented to the FAA during a meeting on July 27, 2000 with the Administrator. A summary of this meeting can be found in the public docket.

The ALPA representative expressed general support for the FOQA concept. However, ALPA believes the proposed rule goes beyond data protection and beyond the intent of AIR-21. ALPA takes the position that the legislation was very simple and very specific, i.e., there should be no enforcement based on FOQA data except for criminal or deliberate acts. Industry believes that the language of the FOQA NPRM concerning remedial enforcement is not consistent with congressional direction on FOQA in AIR-21.

ALPA and ATA believe that the rule wording could be interpreted to mean that operators would have to keep underlying FOQA data for an indefinite period of time. They believe that the language of the preamble clearly indicates it is the FAA's intent to obtain underlying FOQA data under certain circumstances, and to use that data for enforcement purposes.

The biggest differences between the FAA and industry positions concern enforcement and data access. The FAA believes that it must retain the discretion to employ remedial enforcement if aggregate trend data indicate that a continuing unsafe condition may exist, when the operator fails to take appropriate action on its own. The FAA believes it must be able to obtain aggregate trend data to enable it to better accomplish its safety oversight and surveillance mission. The industry representatives are of the opinion that the FAA should be prohibited from taking any enforcement action that is based on FOQA data against an operator or its employees, except in the event of deliberate or criminal acts. Industry representatives believe that both the preamble and the rule language should be revised to remove any indication that the FAA has a right to underlying FOQA data. Industry further believes that the requirement in the proposed rule to submit aggregate FOQA data to the FAA will inhibit future growth and innovation in U.S. airline FOQA programs. They therefore recommend that the provision for mandatory submission of aggregate FOQA data be deleted from the rule language. Industry believes that these concerns are of sufficient magnitude to warrant withdrawal of the existing FOQA NPRM, to be followed by a revised NPRM.